Visa Policy within the European Union Structure

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Foreword

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Annalisa Meloni
July 2005

Contents

List of abbreviations

AFSJ	Area of Freedom, Security and Justice
AJIL	American Journal of International Law
Bull. EC	Bulletin of the European Communities
BYIL	British Yearbook of International Law
CCI	Common Consular Instructions
CFSP	Common Foreign and Security Policy
Cirea	Centre for Information, Discussion and Exchange on Asylum
Cirefi	Centre for Information, Discussion and Exchange on the Crossing of Borders and Immigration
CML Rev.	Common Market Law Review
Coreper	Committee of Permanent Representatives to the European Community
EC	European Community or Treaty establishing the European Community
ECHR	European Convention on Human Rights
ECR	European Court Reports
EEC	European Economic Communities
EFA Rev.	European Foreign Affairs Review
EHRR	European Human Rights Reports
ELJ	European Law Journal
ELR	European Law Review
EPC	European Political Cooperation
ETS	European Treaty Series
EU	European Union or Treaty on European Union
Europol	European Police Office

GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HLWG	High Level Working Group on Immigration and Asylum
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International Comparative Law Quarterly
IGC	Intergovernmental Conference
IOC	International Olympic Committee
ILM	International Legal Material
ILPA	Immigration Law Practitioners Association
JCMS	Journal of Common Market Studies
JHA	Justice and Home Affairs
LIEI	Legal Issues of European Integration
NATO	North Atlantic Treaty Organization
OJ	Official Journal of the European Communities
PJC	Police and Judicial Cooperation in Criminal Matters
SEA	Single European Act
SIS	Schengen Information System
TEU	Treaty on European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNTS	United Nations Treaty Series
US	United States
VIS	Visa Identification System
YEL	Yearbook of European Law

Introduction

The European Community (EC) has been surrounded by much debate as to its nature. Difficulties in describing the Community derive from its combination of both federal and intergovernmental characteristics. On the one hand, the Community owes its existence to a treaty among sovereign States. It operates under the principle of 'conferral of powers', and the Member States acting as the Council have a prominent role in its operation.

On the other hand, the doctrines of supremacy and direct effect of Community law, as developed by the Court of Justice, give a federal constitutional character to the Community. The development of these doctrines by the Court rests on the claim that the Community established a 'new legal order'.[1]

At national level, national courts have resisted the Court of Justice's approach. The doctrines of direct effect and supremacy are generally applied by national courts on the basis of national constitutional or legislative provisions transferring or delegating sovereignty to the Community, rather than on the basis of the higher nature of Community law. This implies that national courts may declare Community law invalid if it breaches fundamental constitutional rights, and that they retain the ultimate *Kompetenz-Kompetenz*. As one commentator put it: 'They would not be allowed under their own constitution to sign up and ratify a treaty the consequence of which was that they had no ultimate control over the size of the slice of the apple pie which they had given away'.[2]

The difference between the Court of Justice and the national courts with regard to the foundation of Community law illustrates the existence of a lack of consensus on the constitutional nature of the Community. The result of this lack of consensus is that the Community continues to be *sui generis*. This *sui generis* character is at the heart of the Community's democratic deficit.

On the other hand, the conditions for developing the Community into a federal State do not seem at present to exist. This implies that the democratic deficit will not be addressed by transposing the national model of parliamentary democracy to the Community, but that a different model is to be constructed.

The establishment of the European Union (EU) by the Treaty on European Union (TEU) agreed at Maastricht modified the whole picture. With the TEU, the Community was absorbed into a wider legal framework predominantly intergovernmental in character.

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1 *Opinion 1/91 (first EEA)* [1991] ECR I-6079.

2 Evidence given by Professor Craig, House of Lords Select Committee on the European Union (2003-04a), q. 7, p. 7.

The newly established 'European Union' rested on three 'Pillars': the European Community (the First Pillar), the Common Foreign and Security Policy (CFSP – the Second Pillar) and Cooperation on Justice and Home Affairs (JHA – the Third Pillar). The three Pillars were united by the Common and Final Provisions of the TEU. The Second and Third Pillars were essentially 'intergovernmental'. They differed from the Community with regard to decision-making procedure, institutional competences and most importantly the legal effect of adopted instruments.

The three-pillar structure thus represented a compromise in the search for consistency between the Community and intergovernmental cooperation. Recourse to the three-pillar structure made it possible to retain the 'international law method' for CFSP and JHA (and thus national autonomy in these areas), but it also made it possible to 'unite' the Community and intergovernmental cooperation through the establishment of common objectives, common principles and values, a 'single institutional framework', and a requirement for the Commission and the Council to ensure 'consistency' of Union activity.

The actual extent that the TEU could be considered to have 'legally united' the Pillars became the object of much debate, and any answer to this question has important implications for the nature of the Community and the Union.

The unity of the Union was initially denied by commentators on the basis of the different nature of the Pillars. This approach was however criticized on various grounds. First, the Community itself, increasingly, envisages a whole range of different procedures with different institutional competences, and even a different legal effect for instruments adopted in different areas. Second, the approach seems to overlook the efforts of the TEU to unite the Pillars. Third, it also overlooks the Union's capacity to adopt binding legal instruments, its increased decisional autonomy and its emerging international identity. Consensus is emerging that the Union, on the basis in particular of the 'single institutional framework' and the requirement of consistency of Union activity, constitutes a single legal system.

The operation of the Union as a single legal system has nevertheless been problematic. The differences between the Pillars with regard to institutional competences and the difficulties in clearly demarcating competence between them have often led to institutional conflict with regard to the correct allocation of competence between the Pillars. Similar problems do happen within the Community context when different legal bases envisaging different procedures may potentially be used for the adoption of a measure. The demarcation of competence between the Community and the intergovernmental Pillars, however, assumes more significance in the light of the more crucial legal and constitutional implications.

The TEU offers very little guidance for resolving the competence allocation problem. One of the few examples where the TEU regulates the interaction of the Pillars is Article 301 on economic sanctions. Article 47 (requiring that nothing in the TEU shall affect the Treaty establishing the European Community) constitutes a further criterion. However, as has been pointed out, an unconditional reliance on Article 47 whenever issues on competence allocation arise is probably not intended and would empty many of the other provisions of the TEU of any signifi-

cance.[3] A further (last resort) mechanism for determining the allocation of competence is the Court of Justice. The Court has indeed affirmed its jurisdiction to determine the boundary between the Pillars in the *Airport Transit Visas Case*.[4]

In this context, it seems that the practical operation of the Union as a single system depends on the institutions agreeing their respective competences and acting as interlocking components in pursuance of one and the same goal.[5] There have been many examples of institutional conflict on demarcation of powers, but also examples of successful cross-pillar action. Increasingly, issues are tackled by a combination of instruments under the different Pillars. At the same time, increasingly Community policies contain elements of political conditionality, and political decisions are 'implemented' through Community instruments.[6]

This result has also been achieved thanks to a refinement of the three-pillar structure. This refinement has taken two forms. First, it has concentrated on reformulating the allocation of competence between the Pillars, eliminating unclear fragmentation of policies between them (see for example the dual-use goods regime and visa policy).

Second, it has concentrated on creating or strengthening 'procedural and institutional bridges' between the Pillars.[7] This has implied a certain extent of convergence of methods. The role of the Community institutions within the intergovernmental Pillars has been strengthened. The organization and procedures of the intergovernmental Pillars have to some extent been aligned to those of the Community. At the same time, the role of the European Council as the ultimate director of Union activity has been strengthened, and provisions have been inserted in the Treaty with the aim of increasing the political pressure on the Commission to execute CFSP decisions.

Convergence of methods has also resulted from a different process. This process is a continuing attempt, both within the framework of the Community and within that of the intergovernmental Pillars, to 'reconcile almost irreconcilable interests', namely uniformity versus diversity and efficiency versus democratic choice.[8]

Unity has important implications for a definition of the EC and the EU. Some commentators have submitted that unity 'requires a rethinking of age-old doctrines about the nature of European Community law'.[9] At the same time, however, it has been argued that unity implies that 'the legal principles developed in the context of the EC Treaty can be extended to the EU Treaty as long as they are not expressly excluded'.[10] Furthermore, the issue of unity opened the debate on whether internal unity necessarily implied external unity (i.e. a single identity or even legal personality).

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3 Wessel (2000a) p. 1148.
4 Case C-170/96 *Commission v. Council* [1998] ECR I-2763.
5 Schmalz (1998) p. 439-440.
6 Cremona (1999) pp. 161 and 171.
7 Schmalz (1998).
8 Verhoeven (2002) p. 71.
9 De Witte (1998) p. 65.
10 Von Bogdandy (1999) p. 909.

The Constitutional Treaty, with its aim to 'simplify and reorganize' the Treaties, meant to introduce significant changes. The pillar structure was to be abandoned in favour of a unitary structure, and a single entity with legal personality – the European Union – was to be created. Important institutional changes were to accompany the introduction of this unitary structure. It remained unclear whether this new design implied an extension of the Community legal method to the Second Pillar, with the relevant constitutional implications, with, unsurprisingly, no possibility of a clarification from the Court of Justice.

This study is intended to contribute to the understanding of the structure of the European Union through an analysis of the working of such a structure in relation to visa policy. Visa policy has been selected for three reasons. First, its formation documents the development of the structure of the European Union. In particular, visa policy shows how this structure was developed and refined over time in order to increase the efficiency of intergovernmental cooperation and permit the smooth functioning of the Union as a 'unity'. Intergovernmental cooperation and its association with the Community were continuously strengthened, and the allocation of competence between the Pillars was continuously reformulated, with the final introduction of Community competence for visas accompanied by opt-out/opt-in arrangements for three Member States.

Second, visa policy, notwithstanding its 'communitarization' with the Treaty of Amsterdam, continues to straddle all the Pillars of the Union because of the ramifications of visas into areas for which the Member States retain ultimate competence, and which increasingly form the object of cooperation within the intergovernmental Pillars. Visa policy, because of its cross-pillar nature, therefore provides an opportunity to consider the interaction of the Pillars. In particular, it is possible to consider issues relating to delimitation of competence, the impact of the Pillars' overlap on the nature of the common policy, and the viability of the pillar structure.

The third reason for selecting visa policy relates to the fact that visa policy is part of the Union's wider policy on the formation of an 'area of freedom, security and justice'. In relation to the construction of the area of freedom, security and justice, the Union has declared its determination to act as a 'unity'. The construction of the area of freedom, security and justice requires the coordination of policies falling under different Pillars, the integration of justice and home affairs concerns into the Union's external activity and the coordination of different Treaty objectives. In this context, it is possible to trace some of the institutional and legal implications of the Union acting as a unity, as well as some of the obstacles to the smooth functioning of the Union structure.

This study thus essentially focuses on the issue of 'consistency' under the three pillar structure which is ultimately relevant in relation to possible reforms of such a structure and for a definition of the Community and the Union.

The first chapter of this book provides the background for this analysis by tracing the nature of visas. This is at the heart of many of the difficulties encountered in the process of harmonization of national visa policies, and explains the cross-pillar character of the common visa policy. The second and third chapters trace the development of the structures for cooperation and the characteristics of the com-

mon policy. The fourth and fifth chapters consider the issue of consistency both with regard to the functioning of the common visa policy and with regard to the construction of the 'area of freedom, security and justice'. Finally, some conclusions will be drawn as to what visa policy reveals on issues such as division of competence, consistency, and the increasing complexity of the European legal framework.

1 Visas in international and municipal laws

This Chapter considers the significance of visas and passports in international law and practice and from the domestic point of view. For this purpose it is divided in two parts. The first part considers the international law rules which directly or indirectly govern movement of persons across state frontiers. More precisely, it considers the limits on state discretion to control movement stemming from international customary and treaty law, the basic rules on movement, and the role of nationality.

The second part of the Chapter analyses against the international background the legal and political significance of visas and passports. It considers their definition, implications and functions under international law and practice and from the national point of view.

This Chapter provides the background to look at the process of European integration with regard to visa policy. In particular, by highlighting the significance of visas and how they are linked to the concept of sovereignty, it provides the background for an analysis of European integration on visa policy as a case study of the constitutional structure of the European Union.

1.1 Limits on state discretion over the movement of persons across state frontiers

1.1.1 State discretion over entry, residence and expulsion of aliens

It is generally accepted that States are free to control the entry and residence of aliens into their territory, and to expel or deport aliens, especially for reasons of public order and national security.[1] Such discretion is inferred from sovereignty.

In contemporary international relations, it is however apparent that state sovereignty in this area is not absolute.[2] Principles of general international law and obligations arising out of treaties limit state discretion as to entry, transit, residence and expulsion of aliens. Such limitations are reflected in domestic legislation.

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[1] See for example *The Chinese Exclusion Case (Chae Chan Ping v. US)* 130 US 581, 609 (1889). For the sources of the principle see Plender (1988) pp. 1-4; Harris (1998) pp. 525-526.

[2] See Goodwin-Gill (1978); Plender (1988).

Limits on expulsion under rules of general international law

Rules of general international law regarding the treatment of aliens provide for limits on the circumstances and the manner in which a State may expel aliens. As Goodwin-Gill argues: 'The power of expulsion is a discretion, not absolute, but limited by the rules and standards of international law'.[3] In particular, a State may not expel aliens in an arbitrary or discriminatory manner, or in breach of its international obligations. Thus, a State may not use unnecessary force, mistreat the alien or refuse to give the alien sufficient time to wind up his affairs.[4]

Moreover, it has been argued that any claim of 'ordre public', forming the basis for the expulsion decision, is to be weighed against the interests of the individual, including his basic human rights, family, property and legitimate expectations, in accordance with the principles of good faith and 'reasonable cause'.[5]

A number of multilateral treaties also impose restrictions on the State's discretion to expel aliens.[6]

Movement of special categories

Rules of general international law and treaties exist with regard to special categories of aliens.

Acquired rights

With regard to aliens who, under the law of the host State, have an indefinite right of residence in the host State, it has been argued, on the basis of congruence of state practice, that they are vested with 'acquired rights' or 'legitimate expectations' as to their entry and stay in the State.[7]

Diplomats and consuls

Diplomats and consuls are a further category in relation to whose movement across frontiers special rules exist. Such rules are part of the privileges and immunities attached to this special category which are justified on functional necessity.

It is generally accepted that a diplomat who arrives at the frontier of the State to which he is to be accredited is to be admitted. Any objection to his appointment is

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3 Goodwin-Gill (1978) p. 204.

4 For the sources of this rule see Harris (1998) pp. 527-530.

5 Harris (1998) p. 529.

6 See for example Article 4 of the Fourth Protocol to the ECHR 1963 (ETS 46) which prohibits the collective expulsion of aliens. See also Article 1 of the Seventh Protocol 1984 (ETS 117) which states that an alien can be expelled only in pursuance of a decision reached in accordance with law, and that he has a right to have his case reviewed, unless public order or national security require that he is expelled before he exercises such right. See also Article 13 of the ICCPR 1966 ((1967) 6 ILM 368).

7 See Goodwin-Gill (1978) pp. 259-261; Plender (1988) pp. 161-162.

to be raised before he is dispatched to take up his post.[8] Such a rule is reflected in domestic legislation. The United Kingdom Immigration Act 1971 as amended, for example, provides that laws affecting non-patrials are not applicable to members of diplomatic missions and members of their families.[9] There is however no general rule by which diplomats are exempt from visa requirements, but, as a matter of international comity, visas, when required, must be issued promptly.[10]

A right of transit through third States does not seem to exist. Article 40 of the Vienna Convention on Diplomatic Relations 1961 provides that a diplomatic agent passing through a third State, *which has granted him a visa if such visa was required*, while proceeding to take up or returning to his post, or when returning to his country shall be accorded inviolability and such immunities as are necessary to ensure his transit.[11] Article 40, accordingly, provides no right of transit to diplomatic agents, but confirms the right of the transit State to refuse passage.[12]

Article 44 of the Vienna Convention lays down the receiving State's obligation, in case of armed conflict, to grant facilities for departure. The duty to grant facilities for departure was interpreted in some States as conferring exemption from exit visa requirements in ordinary circumstances.[13]

Similar rules exist with regard to the admission of consuls. Furthermore, Article 46 of the Vienna Convention on Consular Relations 1963 provides for exemption from obligations in the matter of alien registration, residence and work permits for consuls, members of their families and certain of their staff.[14]

Representatives to, staff and experts of international organizations

Special rules also exist with regard to representatives to, staff and experts of international organizations. Before modern practice became established, international officials were treated by analogy with diplomats. As Goodwin-Gill argues: 'This practice could clearly compromise their independent status by subjecting them to the vagaries of national passport regimes and to the personal objections of receiving States'.[15] Today, Article 105 of the United Nations (UN) Charter provides that representatives of Members of the UN and officials of the UN shall enjoy such privileges and immunities as are necessary for the independent exercise of their

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[8] See Goodwin-Gill (1978) pp. 147-148; Plender (1988) pp. 163.

[9] C.77, Section 8(3).

[10] Goodwin-Gill (1978) p. 150.

[11] 500 UNTS 95.

[12] See Denza (1998) p. 369. The issue of transit may be regulated by treaty. The 1929 Lateran Treaty between the Holy See and Italy, for example, stipulates the right to transit through Italy for representatives and envoys of the Holy See, diplomatic representations and envoys of States to the Holy See and dignitaries of the church if they possess passports issued by the countries from which they come and visas issued by papal representatives abroad. See Turack (1972) p. 210; Denza (1998) p. 368.

[13] See Denza (1998) p. 389.

[14] 596 UNTS 261. Goodwin-Gill argues that similar principles apply to the admission of special missions. See Goodwin-Gill (1978) p. 152.

[15] Goodwin-Gill (1978) p. 152.

functions. Building on Article 105, the 1947 General Convention on Privileges and Immunities of the United Nations provides that Members' representatives to the UN and UN officials are to enjoy, while exercising their functions and during their journey to and from the place of meeting, exemption from immigration restrictions and alien registration.[16] Similar provisions are provided with regard to UN specialized agencies by the 1947 Convention on the Privileges and Immunities of Specialized Agencies.[17] These Conventions are supplemented by bilateral headquarters agreements. The United States (US)-UN Headquarters Agreement,[18] for example, provides that US authorities will not impede transit to and from the headquarters, independently of the relationship between the US and the government of the individual concerned. Visas may be required, but these must be issued promptly. It however appears that in a number of occasions States have departed from the obligations to grant admission for political reasons.[19]

The UN Conventions and Headquarters Agreements have also formed models for subsequent agreements made by other organizations including the Council of Europe and, to a lesser extent, the European Community.[20]

Such international obligations are implemented in the United Kingdom under the Immigration Act 1971 and the International Organizations Act 1968 as amended.

Visiting forces

Armed forces of foreign countries or international organizations may also be exempt from provisions of immigration laws, in accordance with international treaties or as a result of special agreements with the host State.[21]

Seamen and aircrews

Seamen and aircrews are further categories which, because of functional necessity, benefit from their own special international travel regimes. As Goodwin-Gill states: 'The International Civil Aviation Organization and the International Maritime Consultative Organization have both pioneered the widespread adoption of international standards and practices regarding the movement of seamen and air-

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[16] 1 UNTS 15.

[17] 33 UNTS 261.

[18] 11 UNTS 11.

[19] In the early 1990s, for example, the US government denied Arafat a visa for a trip to the UN. See also Plender (1988) p. 173, with regard to the practice by some Islamic countries of refusing to admit representatives sent by Israel to meetings of international organizations taking place within their territories.

[20] See Plender (1988) p. 171. See for example the Protocol on the Privileges and Immunities of the EEC 1957, 298 UNTS 170.

[21] See for example the NATO Status of Forces Agreement 1952, which provides that members of the forces are to be exempt from passport and visa requirements and immigration inspection on entering or leaving the territory of the receiving State. See Plender (1988) pp. 176-180.

crews. Most of the progress has been accomplished in the years since 1950 and, as with many such developments, the process began through the medium of the bilateral treaty'.[22]

With regard to aircrews, Annex 9 to the Chicago Convention on International Civil Aviation 1944 stipulates that holders of a crew member license or certificate, complying with certain requirements, are to be exempted from passport and visa requirements, provided certain conditions as to their stay are fulfilled.[23] Implementing such recommendations, the United Kingdom Immigration Act 1971 provides that aircrews do not require leave to enter when they enter on engagement and leave within seven days, provided certain conditions are fulfilled.[24]

Despite the general acceptance of Annex 9, some States implement it through bilateral agreements based on reciprocity.[25]

With regard to seamen, the Seafarers' National Identity Documents Convention 1958 provides for the issue by Contracting States to their national seafarers of a seafarers' identity document.[26] This identity document may also be issued to non-nationals seafarers. In such a case, no statement of the holder's nationality is required (and if one is included it is not treated as conclusive proof of nationality) but the issuing State is under an obligation to re-admit the holder into its territory.

The 1958 Convention further stipulates that the Contracting Parties are obliged to admit a seafarer holding a valid seafarers' identity document for temporary shore leave, to join a ship, or for transit.[27]

The Convention on Facilitation of Maritime Transport 1965 provides that a valid seafarers' identity document or a passport shall be the basic document providing public authorities with information relating to the individual member of the crew on arrival or departure of a ship.[28] Furthermore, the Convention provides that a seafarers' identity document is to be accepted in lieu of a passport when it is necessary for the seaman to enter a country to join a ship or transit to join a ship in another country or for repatriation, provided the document guarantees the holder re-admission to the issuing State. Implementation of the Convention's international regulations is voluntary. In the United Kingdom, implementation takes

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22 Goodwin-Gill (1978) p. 156.

23 15 UNTS 295. For a full analysis see Turack (1972) pp. 149-153. Article 22 of the Convention requests the Members 'to adopt all practical measures, through the issuance of special regulations or otherwise, to facilitate and expedite navigation by aircraft between the territories of Contracting States, and to prevent unnecessary delays to aircraft, crew...especially in the administration of the laws relating to immigration ...and clearance'.

24 Section 8(1).

25 Turack (1972) p. 152.

26 389 UNTS 277.

27 See Turack (1972) p. 140.

28 4 ILM 501. Under the Convention, the Contracting Parties, with the aim of facilitating and expediting international maritime traffic, bound themselves to 'co-operate in securing the highest practicable degree of uniformity in formalities, documentary requirements and procedures in all matters which would facilitate and improve international maritime traffic'. See Turack (1972) p. 142.

place through the Immigration Act 1971, which provides that members of ship crews may enter and remain without leave until the departure of the ship on which they are engaged, provided certain conditions are satisfied.[29]

Other categories

A number of other multilateral and bilateral treaties affect the movement across frontiers of special categories of persons. Agreements may be concluded, for example, with regard to the hosting of international sporting events. Rules established by the International Olympic Committee (IOC), entrusted by the 1894 Congress of Paris with the control and development of the modern Olympic Games, provide, for example, that the national government of a city applying to host the Olympic Games must give the assurance that every competitor will be given free entry without discrimination on grounds of nationality, religion, colour or political affiliation. This involves the assurance that the national government will not refuse visas to any of the competitors. States have however often breached such rules and the prospect of sanctions by the IOC has not worked as a deterrent. In 1976, for example, the Canadian government refused visas to the representatives of Taiwan for the Montreal Olympic Games because they were unwilling to forgo the title of the Republic of China under which their National Olympic Committee was admitted to the IOC.[30]

Other treaties affecting the movement of special categories of persons across frontiers include the European Agreement on Travel by Young Persons on Collective Passports 1961,[31] the European Agreement on the Abolition of Visas for Refugees 1963,[32] and the European Agreement on Au Pair Placement 1969.[33]

Common travel areas and passport unions

After the Second World War efforts were made among governments to reduce the restrictions on movement of persons that had developed in response to the state of emergency brought about by the two World Wars. Various 'common travel areas' and 'passport unions' were established.

The Benelux Economic Union

In 1958 Belgium, Luxembourg and the Netherlands signed the Treaty establishing the Benelux Economic Union.[34] This Treaty was the culmination of a number of agreements concluded by the Parties between 1945 and 1958,[35] and provided for

[29] Section 8(1).
[30] Encyclopaedia Britannica CD 99.
[31] ETS 37.
[32] ETS 31.
[33] ETS 68.
[34] 5 Ybk (1959) 167.
[35] Plender (1988) p. 274.

the free movement of persons, goods, capital and services. It provided that nationals of the Contracting Parties could enter or leave the territory of any other Contracting Party, and that they were to receive the same treatment as nationals with regard to movement, sojourn, settlement, freedom to carry out a trade or occupation and the provision of services. The Treaty stipulated that a further Convention was to be concluded with regard to the provisions under which a Contracting State might justify restricting the movement of nationals of another Contracting State on grounds of public order, public security, public health or morality.

Two Conventions were accordingly concluded in 1960: the Convention on Establishment and the Convention concerning the Transfer of Entry and Exit Controls to the External Frontiers of the Benelux Territory.[36] This latter Convention provides for the Parties to abolish internal frontier controls and effect external border controls valid for all the Benelux territory. A common visa policy and common conditions of entry for non-Contracting Parties' nationals were established. It was further provided that a person admitted to the Benelux territory was to be free to travel within the territory of the Contracting Parties for a limited period of time. The Parties undertook to harmonize their laws relating to the punishment of infringements and reserved the right to re-impose internal frontier controls for reasons of public order or national security.[37]

The Nordic Community

In 1957 Denmark, Finland, Norway, Sweden and Iceland concluded the Convention concerning the Waiver of Passport Control at the Intra-Nordic Frontiers.[38] The Convention provides for the establishment of common standards for passport controls at the external borders. It is complemented by agreements establishing a common labour market and recognition of social security entitlements.

The Common Travel Area between the United Kingdom and Ireland

A common travel area was also established in 1952 between the United Kingdom and Ireland.[39] Under the arrangement, citizens of either country may cross the frontiers between the two countries without producing a passport or other identity document. Third country nationals are subject to immigration control only on initial entry to either country from abroad.

Efforts within the framework of the Council of Europe

After the Second World War efforts to reduce the strictness of the existing passport regimes were also undertaken within the Council of Europe. Work on the fea-

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[36] 374 UNTS 3.

[37] For a detailed analysis see Turack (1972) pp. 89-100; Plender (1988) pp. 273-276.

[38] 322 UNTS 245. For an account see Turack (1972) pp. 81-87; Plender (1988) pp. 288.

[39] See Section 9 of the Immigration Act 1971. The Agreement has not been published. See Turack (1972) p. 118.

sibility of introducing a European passport was referred to the Committee on Legal and Administrative Questions of the Council of Europe. Following recommendations from the Legal Committee, in 1949 the Consultative Assembly recommended to the Committee of Ministers to instruct each Member State to study the question of a European passport. However, replies from the Member States indicated that the emergence of a European passport was not feasible, but only standardization of national passports was acceptable. The Committee of Ministers accordingly adopted a resolution establishing the governmental Committee of Experts on Passports and Visas to study standardization of national passports and measures to facilitate freedom of movement.[40] Intergovernmental efforts produced a series of multilateral and bilateral agreements between the Member States. Among these was the European Agreement on Regulations governing the Movement of Persons between the Member States of the Council of Europe signed by Austria, Belgium, France, the Federal Republic of Germany, Greece, Italy and Luxembourg on 13 December 1957.[41] The Agreement provided that nationals of a Contracting State could enter or leave the territory of other Contracting States for visits of no more than three months on presentation at the frontier of one of the documents contained in the Appendix. These included passports, identity cards and other identity documents. As Turack states: 'This meant that the passport was no longer essential for travel, however, the use of the passport as one of the identity documents suitable for travel was maintained because a number of member states expected to sign the agreement did not issue identity cards – Iceland, Ireland, the Netherlands, and the United Kingdom'.[42] Under the Agreement each Contracting State reserved the right to forbid the entry of nationals of other Contracting States considered 'undesirable', and to temporarily suspend the operation of the Convention on grounds of 'ordre public', security or health. Several Contracting States invoked such power in the 1980s to suspend the operation of the Agreement in relation to Turkey.[43]

Other instruments agreed within the framework of the Council of Europe include: the European Convention on Establishment 1955,[44] by which the Contracting States undertook to facilitate the entry into their territory of each others' nationals for the purpose of temporary visits provided this was not contrary to 'ordre public', national security, public health or morality;[45] the Fourth Protocol to the European Convention on Human Rights 1963,[46] which requires *inter alia* respect for the right to move freely within the territory of the Contracting States and for the right to leave that territory subject to restrictions necessary in the interest of

[40] See Turack (1972) pp. 67-74.

[41] ETS 25.

[42] Turack (1972) p. 75.

[43] Plender (1988) p. 344.

[44] ETS 19.

[45] The European Convention on Establishment deals with all questions affecting an alien permanently resident in a European State such as entry, residence, expulsion, exercise of private rights, judicial and administrative guarantees, individual and political rights, taxation, expropriation and naturalization. See Plender (1988) pp. 236-240.

[46] *Supra* n. 6.

public order and national security; the European Agreement on Travel by Young Persons on Collective Passports 1961;[47] the European Social Charter 1961;[48] the European Convention on Social Security 1972;[49] and the European Convention on the Legal Status of Migrant Workers 1977.[50]

Efforts between the Member States of the European Community

The establishment of a passport union was also considered by the Member States of the European Community during the 1970s.[51] However, as a result of increased terrorism in particular, active consideration was eventually given only to the establishment of a uniform format for national passports.

A non-binding intergovernmental Resolution was agreed on 23 June 1981.[52] Under this the Member States would issue their passports in an agreed uniform format – described in the Resolution – by 1 January 1985. The data page of the uniform format passport was to be the data page agreed within the context of the International Civil Aviation Organization (ICAO).

Treaties on commerce and establishment and economic integration

Treaties on economic integration and on commerce and establishment are a further category of treaties establishing limitations on the State's discretion over entry of aliens. The Treaties establishing the Benelux Economic Union and the Nordic Community are examples of treaties on economic integration. The European Community constitutes a special case. The EC Treaty provides for an 'individual right' for nationals of the Member States to move freely within the Community for the purpose of employment, establishment or the provision or reception of services.[53] Secondary Community law clarifies the public policy, security and health grounds under which a Member State may exclude an EC national in derogation from the free movement provisions.[54] The European Court of Justice has interpreted such grounds restrictively.[55]

With regard to bilateral treaties on commerce and establishment, they generally provide, with the purpose of securing 'national treatment', that nationals of each contracting party 'shall have a right of entry subject to compliance with national

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47 *Supra* n. 31.

48 529 UNTS 89.

49 ETS 78.

50 ETS 93.

51 For a fuller account see Chap. 2.

52 Resolution of the Representatives of the Governments of the Member States, OJ 1981 C 241.

53 Articles 39-55 EC Treaty. By virtue of secondary Community law, economically inactive but self-sufficient EC nationals also enjoy free movement rights. See for example Directive 90/364, OJ 1990 L 180/26.

54 Directive 64/221, OJ Sp. Ed. 1964 L 850/64.

55 See for example Cases 67/74 *Bonsignore* [1975] ECR 297; 30/77 *Bouchereau* [1977] ECR 1999.